In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 465

EMILIO EMINENTE, PETITIONER

v.

LYNDON BAINES JOHNSON, ROBERT S. MCNAMARA AND DEAN RUSK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Alleging that the military activities in and over North Viet-Nam had damaged property which he owns there, petitioner sued to enjoin the respondents—the President of the United States and the Secretaries of Defense and of State—from continuing those activities, and to recover damages in the amount of one million dollars. The district court dismissed the complaint against the President because it lacked jurisdiction over him, and dismissed the complaint against Secretaries McNamara and Rusk on the grounds "that the plaintiff lacks standing to

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maintain this action, that the complaint fails to raise a justiciable controversy, and that this is an unconsented suit against the United States." The court of appeals affirmed, holding that this was an unconsented suit against the United States which presented a non-justiciable policital question (Pet. App. 1).[1]

The decision of the court of appeals is plainly correct and there is no occasion for further review.

1. Although petitioner purports to sue the respondents in their private capacities, this is actually an unconsented suit against the United States, since "the judgment sought would expend itself on the public treasury * * * or * * * the effect of the judgment would be to restrain the Government from acting * * *." *Dugan* v. *Rank,* 372 U.S. 609, 620; *Ex parte State of New York, No. 1,* 256 U.S. 490, 500; *In re Ayers,* 123 U.S. 443, 492.

Petitioner to the contrary, the conduct complained of is within the authority vested by the Constitution in the Executive. The President possesses "in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs" (*Chicago & Southern Air Lines* v. *Waterman S.S. Corp.,* 333 U.S. 103, 109), and his "very delicate, plenary and exclusive" power in the field of foreign relations "does not re-

[1] In the court of appeals, petitioner withdrew his claim for injunctive relief (Pet. 5). The propriety of the district court's dismissal of the complaint as to President Johnson, which petitioner challenged in the court of appeals, is not questioned by the petition.

quire as a basis for its exercise an act of Congress * * *'' (*United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 320). The direction of military activity in Viet-Nam thus clearly is within the Executive's constitutional authority.

There is no merit to the contention that the President cannot authorize such activity without a congressional declaration of war. It is clear that "hostilities may subsist between two nations'' without a declaration of war (*The Eliza,* 4 Dall. 37, 40; H. Rep. No. 127, 82d Cong., 1st Sess., p. 20) and that authority to direct such hostilities is implicitly granted the President by the Constitution (see *In re Neagle,* 135 U.S. 1, 64). Indeed, the "Executive has used force abroad at least a hundred times to accomplish national purposes without reference to Congress.'' Rogers, *World Policing and the Constitution* (1945), p. 56; see H. Rep. No. 127, 82d Cong., 1st Sess., pp. 55–62; H. Doc. No. 443, 84th Cong., 2d Sess. In any event, Congress has approved the action thus taken under the independent authority of the President both expressly (in the "Gulf of Tonkin Resolution'', 78 Stat. 384) and by appropriating funds to support that action (Pub. L. 89–18, 79 Stat. 109; Pub. L. 89–367, 80 Stat. 36).

2. Since this suit seeks in effect to have the courts alter the direction of the nation's foreign policy, the court below properly held that it presented a nonjusticiable political question. This case is not one which merely "touches foreign relations'' (*Baker* v. *Carr,* 369 U.S. 186, 211); it involves a direct chal-

lenge to the wisdom of the Executive's decision as to how our foreign relations ought to be conducted. As this Court has said (*Johnson* v. *Eisentrager*, 339 U.S. 763, 789):

> Certainly it is not the function of the Judiciary to entertain private litigation—even by a citizen—which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region. * * * The issue tendered * * * involves a challenge to conduct of diplomatic and foreign affairs, for which the President is exclusively responsible.

See, also, *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111; *Baker* v. *Carr*, *supra*, at 217; *Marbury* v. *Madison*, 1 Cranch 137, 166.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

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Respondents.

REPLY OF PETITIONER.

GEORGE T. ALTMAN,
424 South Beverly Drive,
Beverly Hills, Calif. 90212,
Attorney for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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The memorandum of respondents in opposition completely evades the issue here.

Since, by express allegation in the complaint, no recovery was sought from the United States through a judgment against respondents (Pet. 4), the judgment sought could not possibly "expend itself on the public treasury" (Opp. 2). Nor could it "restrain the Government from acting" (Opp. 2), since the suit, as submitted below, was for private damages only. It is of the utmost significance then that not a single case cited by respondents, nor by the court below, involved a suit for private damages.[1]

[1]In the first of the *Pauling* cases cited in the concurring opinion below (Pet. App. 2), there was, it is true, a claim by some of the litigants for damages, but in footnote 2 in that case, 278 F. 2d at page 253, it is noted that those claims, by admission in the complaints, were "not monetarily compensable." Also, the case relied on in both of the *Pauling* cases, *Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447, involved only a claim for injunctive relief.

Thus, the quotation in the petition, at page 11, from *Nixon v. Herndon*, 273 U.S. 536, is directly in point. That the suit involves political action, or foreign relations, or any other area of governmental concern, is wholly irrelevant. The question is solely whether the damage complained of was authorized. Respondents apparently realize this in attempting to defend the damage by reference to the "Gulf of Tonkin Resolution," and certain appropriations. Whether they did, and could, authorize the damage complained of, is, indeed, for the courts to decide. *Wheeldin v. Wheeler*, 373 U.S. 647, 650-51, cited on this in the petition, at pages 8-9.[2] But that is just what the courts below declined to do.

Respectfully submitted,

GEORGE T. ALTMAN,

Attorney for Petitioner.

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[2]The memorandum in opposition, in a footnote on page 2, says that the petition does not question the action below as to President Johnson. We do not understand the petition to be thus limited.